ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

RESERVED
(Court No. 2)

Transferred Application No. 22 of 2013

Thursday, this the 15th day of December, 2016

"Hon'ble Mr. Justice D.P. Singh, Member (J)
Hon'ble Air Marshal Anil Chopra, Member (A)"

Anil Kumar S/o Shri Deena Nath Chaturvedi, Advocate, resident of village-Daulatpur, P.S. Dudhara, District-Basti (Uttar Pradesh)

.....Petitioner

By Col (Retd) R.N. Singh, Counsel for the petitioner.

Versus

1. Union of India through Chief of the Army Staff, New Delhi.

2. Commanding Officer, 2 Training Battalion, Bengal Engineer Group & Centre, Roorkee-247667.

3. Lt Col Adjt O/C Records L.T.R.G. Bn. BEG & Centre, Roorkee.

.....Respondents.

By Shri G.S. Sikarwar, Counsel for the respondents assisted by Major Soma John, Departmental Representative.

ORDER

"Per Air Marshal Anil Chopra, Member (A)"

1. Being aggrieved with impugned order to suffer rigorous imprisonment for three months in civil prison and dismissal from service dated 06.08.1991 the petitioner approached the High Court of Judicature at Allahabad by preferring Civil Misc Writ Petition No 32347 of 1991 which on establishment of this Tribunal has been transferred to this Tribunal in pursuance of Section 34 of the Armed Forces Tribunal Act, 2007 and re-numbered as T. A. No 22 of 2013.

2. We have heard Col (Retd) R.N. Singh, Ld. Counsel for the petitioner and Shri G.S. Sikarwar, Ld. Counsel for the respondents assisted by OIC Legal Cell.

3. In nutshell, the brief facts of the case are that petitioner Anil Kumar was enrolled in the Indian Army on 23.02.1989. On joining, he was attached to 2 Training Battalion of BEG & Centre Roorkee. He got married during training on 27.04.1990. The petitioner was granted six days casual leave with effect from 02.07.1990 to 07.07.1990 during training period but he overstayed leave for 62 days from 08.07.1990 to 07.09.1990. Subsequently the petitioner proceeded on 28 days

annual leave with effect from 03.12.1990 to 30.12.1990 as per training schedule. The petitioner was again granted 4 days casual leave with effect from 04.03.1991 to 07.03.1991 and was to report back on 08.03.1991. The petitioner sent a telegram for grant of annual leave for two months from 08.03.1991 onwards but was sanctioned leave only with effect from 08.03.1991 to 23.03.1991 i.e. for fifteen days. The petitioner overstayed leave from 24.03.1991 to 17.05.1991 i.e. for 55 days. It appears that apprehension roll was issued in consequence thereto the petitioner was apprehended by civil police Basti and handed over to Dogra Regimental Centre, Faizabad on 17.05.1991. He escaped from Quarter Guard of Dogra Regimental Centre, Faizabad on 22.05.1991 and on 06.06.1991 he was brought to the unit by his father. On 12.06.1991 the petitioner again deserted without leave from unit on 22.06.1991. He was again apprehended by civil police on 23.07.1991 after an desertion of 42 days.

4. The total absence from duty/desertion aggregated to 175 days.

5. The Commanding Officer ordered recording of Summary of Evidence on 23.07.1991. Copy of the

Charge Sheet and Summary of Evidence was served on the petitioner on 02.08.1991.

6. The Summary Court Martial concluded proceedings and announced its verdict imposing punishment of Rigorous Imprisonment for three years and dismissal from service by the impugned order.

7. Against the order of Summary Court Martial imposing punishment of rigorous imprisonment and dismissal from service the petitioner approached the statutory authority by preferring a statutory complaint dated 01.10.1991 which was dismissed vide order dated 16.03.1992.

8. It was vehemently argued by Ld. Counsel for the petitioner that the mandatory provision of Rule 34 (1) of the Army Rules, 1954 has not been complied with by the Respondents inasmuch as minimum period of 96 hours were not provided to the petitioner to set up his defence before the Summary Court Martial. Ld. Counsel for the petitioner further commented that the impugned order of punishment passed by the Summary Court Martial is vitiated since provisions of Rule 52 (2A) and Rule 115 (2) of the Army Rules, 1954 have not been complied with.

9. On the other hand, Ld. Counsel for the respondents repelled the submissions made by Ld. Counsel for the petitioner and submitted that the petitioner was supplied with copy of the charge sheet and Summary of Evidence in time, and during trial by the Summary Court Martial the accused had pleaded guilty on all the three charges. The petitioner understood the nature of the charges to which he had pleaded "guilty". No injustice has been done against the petitioner.

10 Rule 34 (1) (Supra), for convenience sake may be reproduced as under:

> *"**34. Warning of accused for trial.—**(1) The accused before he is arraigned shall be informed by an officer of every charge for which he is to be tried and also that, on his giving the names of witnesses or whom he desires to call in his defence, reasonable steps will be taken for procuring their attendance, and those steps shall be taken accordingly.*
>
> ***The interval between his being so informed and his arraignment shall not be less than ninety-six hours** or where the accused is on active service less than twenty-four hours.*
>
> *(2) The officer at the time of so informing the accused shall give him a copy of the charge-sheet and shall if necessary, read and explain to him the charges brought against him. If the*

accused desires to have it in a language which he understands, a translation thereof shall also be given to him.

(3) The officer shall also deliver to the accused a list of the names, rank and corps (if any), of the officers who are to form the court, and where officers in waiting are named, also of those officers in court-martial other than summary courts-martial.

(4) If it appears to the court that the accused is liable to be prejudiced at his trial by any non-compliance with his rule, the court shall take steps and, if necessary, adjourn to avoid the accused being so prejudiced."

(Emphasis supplied)

11. The petitioner in para 10 of the petition has specifically pleaded that reasonable opportunity to contest his trial was denied to him. Respondents have not denied this averment in para 23 of the counter affidavit. The petitioner has filed supplementary affidavit which is on record. In para 8 of the supplementary affidavit the petitioner has averred on oath that Charge Sheet dated 02.08.1991 was served upon him at 1500 hours on 06.08.1991 and the Summary Court Martial was convened at 1025 hours on 06.08.1991. The respondents could not negate either by filing a supplementary counter affidavit or at the time of

arguments, the averments made in the supplementary counter affidavit filed by the petitioner. The warning order dated 02.08.1991 for Summary Court Martial is placed at Annexure 1 to writ petition. However neither there is any indication of when it was actually delivered to the petitioner not there is any signature of receipt by the petitioner. In the absence of time mentioned or signatures obtained the respondents could show nothing to prove that the warning letter had been served on the petitioner 96 hours before Summary Court Martial. Thus, the interregnum period between service of charge sheet and summary of evidence and commencement of Summary Court Martial comes to 91 hours and on this score the proceeding of Summary Court Martial and the punishment awarded by it stands vitiated. Non-compliance of provision of Rule 34 (1) of the Army Rules, 1954 requiring period of 96 hours from the date and time of service of charge sheet and summary of evidence and the actual convening of Summary Court Martial cannot be said to be inconsequential merely on the ground that accused has pleaded guilty to all the charges.

12. Our above observation is in consonance with the proposition of law laid down by Hon'ble the Apex Court in

the case of ***Union of India (UOI) and Ors vs. A.K. Pandey.*** In ***U.O.I. vs A.K. Pandey*** (supra) their Lordships of the Supreme Court held that the provision for providing minimum period during course of proceeding is mandatory. Relevant portion of judgment in said case is reproduced as under:-

> *"22. The principle seems to be fairly well settled that prohibitive or negative words are ordinarily indicative of mandatory nature of the provision; although not conclusive. The Court has to examine carefully the purpose of such provision and the consequences that may follow from non-observance thereof. If the context does not show nor demands otherwise, the text of a statutory provision couched in a negative form ordinarily has to be read in the form of command. When the word "shall" is followed by prohibitive or negative words, the legislative intention of making the provision absolute, peremptory and imperative becomes loud and clear and ordinarily has to be inferred as such. There being nothing in the context otherwise, in our judgment, there has to be clear ninety-six hours interval between the accused being charged for which he is to be tried and his arraignment and interval time in Rule 34 must be read absolute. There is a purpose behind this provision: that purpose is that before the accused is called upon for trial, he must be given adequate time to give a cool thought to the charge or charges for which he*

is to be tried, decide about his defence and ask the authorities, if necessary, to take reasonable steps in procuring the attendance of his witnesses. ***He may even decide not to defend the charge(s) but before he decides his line of action, he must be given clear ninety-six hours.*** *A trial before General Court Martial entails grave consequences. The accused may be sentenced to suffer imprisonment. He may be dismissed from service. The consequences that may follow from non-observance of the time interval provided in Rule 34 being grave and severe, we hold, as it must be, that the said provision is absolute and mandatory. If the interval period provided in Rule 34 is held to be directory and its strict observance is not insisted upon, in a given case, an accused may be called upon for trial before General Court Martial no sooner charge/charges for which he is to be tried are served. Surely, that is not the intention; the timeframe provided in Rule 34 has definite purpose and object and must be strictly observed. Its non-observance vitiates the entire proceedings.*

(Emphasis supplied)

13. So far as the submission of Ld. Counsel for the petitioner that the impugned order is bad in law for the reason that there was non-compliance of Rule 115 (2) of the Army Rules, 1954 is concerned, suffice to mention that since we have held that order of punishment by the

Summary Court Martial was in breach of Rule 34 (1) of the Army Rules, 1954 and thus is unsustainable, the submission loses its significance and need not be gone into.

14. Similarly the question of infraction of Rule 33 (7) of the Rules, 1954 espoused by Ld. Counsel for the petitioner becomes redundant in view of our findings recorded above while dealing with the point in issue as to whether the provisions of Section 34 (1) of the Army Rules, 1954 were complied or not, which we have answered in negative.

15. The facts of the case spelt out hereinabove make it explicit that during his two years' service in the Army including the period of training; the petitioner has overstayed leave for 117 days and deserted the Army for 78 days. Thus, the antecedents of the petitioner are not such as may be expected of Army personnel. In several cases this Tribunal has held that Army personnel guilty of desertion does not deserve any lenient view and sympathetic consideration. Desertion from the Army means such a deserter has deserted the country to serve as a member of the elite armed force. A person deserting the Army should not expect any indulgence or

leniency from the Court. There may be situation in which Army personnel may overstay leave but absence of 78 days within a short span of approximately two years of service career in the Army is too much.

16. Before parting with the judgment it may be noticed that the petitioner joined the Army in the year 1989 as Sepoy and in due course of time he would have superannuated after putting in fifteen years of service. Thus is not entitled for re-instatement in service and in the teeth of his service antecedents he is entitled only for notional pensionary benefits from the date of judgment.

17. In view of our observations made hereinabove the petition deserves to be allowed. It is accordingly **allowed**. Impugned order of punishment imposed by the Summary Court Martial dated 06.08.1991 is set aside. He shall not be entitled to back wages but shall be entitled to all pensionary benefits applicable for the rank last held. The pensionary benefits shall come into effect from the date of the present order. The same shall be paid within four months.

No order as to costs.

(Air Marshal Anil Chopra)
Member (A)

(Justice D.P. Singh)
Member (J)

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